No. 310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ALABAMA MILLS, INC., ET AL., *Petitioners*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT TEXTILE WORKERS UNION OF AMERICA IN OPPOSITION

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I

This case has been here before. *Covington Mills* v. *Mitchell*, No. 682, October Term 1955, 350 U. S. 1002.

This is the sequence. The petitioners brought suit against the Secretary of Labor to enjoin him from putting into effect his minimum wage determination. We intervened in support of the Secretary. The District Court enjoined. *Covington Mills* v. *Mitchell*, 129 F. Supp. 740 (D. C., 1956). On appeal, the Court of Appeals reversed. It held on the merits that the Secretary's determination was valid and remanded to the District Court for the entry of a judgment for the Secretary. It also said that the District Court should have passed on the Secretary's motion to dismiss 144 of the 158 plaintiffs. *Mitchell* v. *Covington Mills*, 229 F. 2d 506 (D. C. Cir. 1955).

Petitioners asked for rehearing *en banc* in the Court of

Appeals. It was denied. 229 F. 2d 506. They then petitioned this Court for certiorari. It was denied. 350 U. S. 1002. They asked for rehearing. In their rehearing petition they said that they apprehended that the Court might have denied certiorari because of the lack of a final judgment as to 144 of the 158 plaintiffs and pointed out that as to 14 plaintiffs—naming them—"there has been final judgment . . . With respect to these 14 petitioners, it is agreed on all sides that there is no question of jurisdiction or standing to sue and that they are properly before this Court as petitioners for writ of certiorari." The petition for rehearing was denied. 351 U. S. 394.

The case went back to the District Court. The Secretary withdrew his motion to dismiss some of the plaintiffs (R. 277). The District Court then entered the final judgment which the Court of Appeals had directed (Pet., p. 63a).

The petitioners appealed again. They asked for a hearing *en banc*. It was denied (R. 312). They then submitted the case without oral argument. The Court of Appeals affirmed *per curiam* on the basis of its earlier decision. *Alabama Mills* v. *Mitchell*, 244 F. 2d 21 (D. C. Cir. 1957).

Petitioners now, again, ask for review in this Court by certiorari. Nothing has happened since this Court denied certiorari in the 1955 Term except the entry of the final judgment which the Court of Appeals had directed on the last go-round.

We believe that the Court correctly denied certiorari in the 1955 Term. We believe that it should, for the same reasons, also deny certiorari this Term. The carbon copy of their 1955 petition which the petitioners have now presented to the Court has no greater merit than the original. If the Court should believe it appropriate now to reconsider on the merits its action in denying certiorari two years ago, we respectfully refer it to the Brief in Opposition which we filed in No. 682, October Term 1955, copies of which are submitted with this Memorandum.

II

The only additional point we think it appropriate to make is in answer to the petitioners' contention that the 1955 petition may have been denied because it was "premature" (Pet., p. 14).

While we will not presume to tell the Court what its reasons were for denying the earlier petition, we think it our plain duty to say that neither our brief in opposition nor that of the Secretary even suggested that certiorari should be denied on the governing issue of federal law because the petition was premature.

If such a suggestion had been made it would plainly have been erroneous. The Court of Appeals then had issued a final decision on the single question of federal law which governed the disposition of the law suit. Contrary to petitioners' present assertion, there is no rule requiring or even suggesting that, in such a situation, certiorari should be denied because of the lack of a final *judgement*. The correct criterion, as we understand it, is whether the Court of Appeals has finally decided, on the merits, the determinative issue of law sought to be reviewed here.[1]

There was such a final determination in this case when the petitioners sought review in the 1955 Term.[2] Even if

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[1] *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685. A cursory examination of this Court's opinions in the 1956 Term shows that in at least six cases certiorari was granted to review non-final judgments of the Court of Appeals where the above criterion was satisfied. In none of them did the lack of a final judgment seem to be sufficiently important even to warrant notation in the opinion of the Court. *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U. S. 128; *Brownell* v. *Tom We Shung*, 352 U. S. 180; *Pennsylvania R. Co.* v. *Rychlek*, 352 U. S. 480; *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222; *Lehman* v. *U. S. ex rel Carson*, 353 U. S. 685; *British Transport Commission* v. *United States*, 354 U. S. 129.

[2] The source of petitioners' confusion may be the requirement of a final judgment when an *appeal* is sought to be taken to this Court from a court of appeals, under 28 U.S.C. §1254 (2). Indeed, in the

a final *judgment* were the correct criterion—as it is not—it would have been satisfied. Any suggestion to the contrary was definitely disposed of when the petitioners themselves pointed out, on rehearing, that "there has been final judgment" as to 14 of the petitioners.

III

For the reasons above set forth, it is respectfully submitted that the petition for certiorari herein is wholly without merit and should be denied.

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District Court, petitioners expressly referred to "the public notice of *South Carolina Electric and Gas Co.* v. *Fleming*, Oct. Term 1955, No. 511" (351 U.S. 901) and submitted to the District Court a news article from the Washington Post explaining that this Court's dismissal of the appeal in that case was probably based on the lack of finality, not on the merits.